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In the Supreme Court of the United States

OCTOBER TERM, 1928.

No. 29

ALICE BARBEE WICK, *Appellant,*

vs.

CHELAN ELECTRIC CO.

Basis on Which It Is Contended This Court Has Jurisdiction.

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In the Supreme Court of the United States

OCTOBER TERM, 1928.

No. 652.

ALICE BARBEE WICK, *Appellant,*

vs.

CHELAN ELECTRIC CO.

Basis on Which It Is Contended This Court Has Jurisdiction.

A. Appellant refers to the provision of law believed to sustain the jurisdiction of this Court as Section 237 of the Judicial Code, as amended, as she draws in question the validity of the statute of a state on the ground of its being repugnant to the Constitution of the United States.

B. Judgment of the Supreme Court of the State of Washington (R. 348½). Entered September 4, 1928. Appeal allowed October 8, 1928 (R. 405).

While the judgment remands the case to the Superior Court of Chelan County, the record shows that the entire case has been decided, and the decree of appropriation (R. 340), passed July 9, 1927, before the appeal was taken, shows that the land has been taken

from the appellant, and there is no further proceeding which the lower court can have, and no further order that it can make in the premises.

C. The appellant attacks certain laws of the State of Washington as interpreted by the Supreme Court of the State of Washington, on the ground that they are in conflict with the due process of law clause of the 14th Amendment of the Federal Constitution.

1. Appellant attacks the validity of the statute providing for service on nonresidents in condemnation cases by publication (Remington's Compiled Statutes, Ed. 1922, Sec. 922) as it was interpreted in this case. This statute provides, "A notice stating briefly the objects of the petition, and containing a description of the land, real estate, premises or property sought to be appropriated, and stating the time and place when and where the same will be presented to the court, or judge thereof, shall be served on each and every person named therein as owner, encumbrancer, tenant or otherwise interested therein, at least ten days previous to the time designated in such notice for the presentation of such petition. * * * In all cases where the owner or person claiming an interest in such real or other property, is a nonresident of this state, or where the residence of such owner or person is unknown, * * * service may be made by publication thereof in any newspaper published in the county where such lands are situated, once a week for two successive weeks. * * * Such publication shall be deemed service upon each of such nonresident person or persons whose residence is unknown * * *."

In this case the hearing was set for the 11th of October, 1926, and three publications were made between the 23rd of September and the 7th day of October. One

more publication was given than the law made obligatory, but this did not change the situation, because the third publication was made on the first day after the two weeks had expired, and the case was for hearing on the fourth day thereafter. The publication and the ten days notice were given simultaneously and the court held that this was a proper publication and notice under the statute. Under the ordinary interpretation of this statute the publication should have been made for a full period of two weeks, or fourteen days from the 23rd day of September, the first day of the publication, and this would have amounted to service of the notice, the length of which was fixed by law as ten days, and therefore, the case should not have been heard before October 17, 1926, or ten days after service of the notice had been made. Service was not made until the publication was complete. After that there was but four days to appear and answer. The defect in the notice was called to the attention of the court by a motion to quash the notice combined with a motion to quash the service (R. 15, paragraphs 7 and 9 of both motions), in which the validity of the proceeding under the due process of law clause of the Federal Constitution was raised. The validity of the proceeding under the 14th Amendment of the Federal Constitution was raised by a demurrer (R. 51), and in particular by the six and tenth grounds of the demurrer. The court denied the motions to quash (R. 56) and overruled the demurrer (R. 57).

Appellant again raised the constitutional question in submitting proposed conclusions of law (R. 241) and particularly conclusions of law Nos. 2 and 4, which were refused (R. 520 [Supplemental Record]).

The Supreme Court of the State of Washington in its opinion on this point said:

"Other than the matter of the description of the property hereinbefore discussed, the argument is that the two weeks' publication of notice provided for by statute is unreasonably short to constitute due process of law. A great number of authorities are cited by each side upon this important point. They have been examined but we do not find it necessary or practical to cite or discuss all of them. Counsel for the relator has called attention to authorities deciding the number of publications and intervening time necessary to satisfy a statute requiring publication for a given number of successive weeks. But that is not the question here where under the statute requiring publication once a week for two successive weeks, the fact is that notice was so published for three successive weeks. The real question here is that of reasonable notice to a nonresident and opportunity to be heard. The case nearest in point cited, quoted from and apparently relied on by this relator is Roller vs. Holly, 176 U. S. 398, 44 L. Ed. 520. In that case it was held that a nonresident defendant who was called upon to answer a suit pending in Texas, while he himself was in Virginia, within five days of date of service of citation, was not furnished due process of law. That is, the time under the circumstances was unreasonably short. But we may and of course do agree with that case and still it does not lead to the striking down of our statute that is complained of nor to a holding that the notice in the present case was unreasonably short. Counsel argues, as we understand, that because our statute speaks of two weekly publications that it means eight days' notice and that that length of time under the circumstances in this case does not furnish due process of law under the doctrine of the Roller case. That case speaks of

the date of service with relation to the return day. Our statute says nothing whatever about a return day, but only the number of publications of the notice where publication must be had. The return day not being regulated by statute, as was the case in Roller vs. Holly, *supra*, it is fixed independently of it, so that the question in this case is, was the eighteen days' notice that was actually given, that is the time that elapsed from the date of the first publication of the notice and the return day, unreasonably short under the provision of the constitution?''

In sustaining the service in this case and construing its statute to permit the publication against a nonresident to run simultaneously with the ten days' notice, the State of Washington has made it possible under this statute to have a valid service of process for hearing by giving a notice of ten days and publishing it twice at an interval of eight days within the ten days, and this under the decision of this court is not due process of law upon a nonresident property owner. It is unreasonable to require a property owner in Philadelphia, Pennsylvania, to appear in Chelan County, Washington, ten days after the first publication of a newspaper notice in that county and without other notice. A proceeding under a statute which permits this is not due process of law even though an additional day or two is granted as a favor.

2. The appellant also challenges the validity of the laws of the State of Washington for the condemnation of land on the ground that they are in conflict with the provisions of the due process of law clause of the 14th Amendment of the Federal Constitution, because as interpreted in this case by the Supreme Court of the

State of Washington, they permit the taking of appellant's property for a private use. This question was raised by demurrer (R 51) in the fourth, sixth and tenth grounds. The demurrer was overruled (R. 57). The same question was again raised in proposed findings of fact and conclusions of law (R. 241) and in the exceptions to the findings of fact and conclusions of law made by the court (R. 83 and 87).

The trial court found as a matter of fact that "the electric energy to be generated in said new plant (that of the Chelan Electric Co.) will be delivered to the Washington Water Power Co. at the switchboard of the said new plant for transmission by the Washington Water Power Co. to its customers in the State of Washington" Finding of Fact VI (R. 69). The trial court also by conclusion of law No. 2 (R 79) found as a matter of law that such a use was a public use, thus interpreting its statute of eminent domain as authorizing appellant's land to be taken for such a use.

The objection to the taking as repugnant to the 14th Amendment of the Constitution of the United States was made by demurrer (R. 51) in grounds 6 and 10, and was renewed in the proposed findings of fact and conclusions of law (R. 241) and particularly findings of fact I and VII and XI, and conclusions of law IV and VII (R. 520), and in the additional proposed conclusions of law (R. 520). Due exception was taken (R. 83).

The Supreme Court of the State of Washington passed upon this point as follows:

> "It is claimed that the use contemplated in this case is not a public one, because the Chelan Electric Co. has no transmission line nor any customer except the Washington Water Power

> Co. which owns practically all of the stock of the Chelan Electric Co. That situation was explained in the Getty case. The Washington Water Power Co. is a public service corporation of this state and is handling the enterprise in the name of the other corporation which was organized for similar public purposes. So far as this point is concerned, there is no question about the public use to which the property will be put."

The use to which appellant's land was to be put was to provide for the operation of a hydroelectric plant by the Chelan Electric Co. which proposed to sell all of the current so generated to another power company, undoubtedly greatly to the profit of the Chelan Electric Co. and not to the interests of the public. Statutes which permit such a taking are in conflict with the 14th Amendment of the Constitution of the United States.

3. Appellant also attacks the validity of the statutes providing that taxes upon real estate are a lien upon the land one year before they are permitted to be paid, and says that these statutes are in conflict with Article III, Sec. 2, paragraph 1 of the Constitution of the United States (Remington's Compiled Statutes, 1922).

> Sec. 11234 (9212). "* * * The amount of levy as determined annually by the state board, shall be certified by the auditor of state to each county on or before the last Monday of September of each year. The county taxes shall be levied by the county commissioners between the first and second Mondays of October of each year. * * *"

Sec. 11235 (9213). "For the purpose of raising a revenue for the state, county indebtedness, county current expenses, school, road and other purposes, the board shall, at said October session, levy a tax on all taxable property in the county, as shown by the assessment-roll, sufficient for such purposes: * * *"

Sec. 11239 (9216). "The assessment year contemplated in this chapter shall commence on the first day of March and end on the last day of February in each year, and the fiscal year contemplated in this chapter shall commence on January first and end on December thirty-first of each year."

Sec. 11241 (9218). "On the first Monday of January next succeeding the date of the levying of taxes, the county auditor shall deliver to the county treasurer the tax rolls of his county, with his warrant thereto attached, and taking his receipt therefor, and charging the county treasurer therewith, and keeping an account thereof in the manner required by law."

Sec. 11240 (9217). "* * * The amount of said tax due upon such books shall be charged to the treasurer in an account to be designated as treasurer's 'Tax-roll account' * * * Provided, that the county treasurer shall in no case collect such taxes or issue receipts for the same or enter payment or satisfaction of such tax upon said assessment-rolls before the first Monday of said February following."

Sec. 11252 (9219). "* * * All tax upon real property made payable by the provisions of this act shall be due and payable to the treasurer as aforesaid on or before the thirty-first day of May in each year, * * *."

Sec. 11267 (9230). "All taxes and levies which may hereafter be lawfully imposed or assessed shall be and they are hereby declared to be a lien respectively upon the real estate upon which they may hereafter be imposed or assessed * * *"

Sec. 11272 (9235). "The taxes assessed upon real property shall be a lien thereon from and including the first day of March in the year in which they are levied until the same are paid, but as between a grantor and grantee such lien shall not attach until the first Monday of February of the succeeding year. * * *"

Appellant applied for a removal of this cause to a Federal Court (R. 23), October 30, 1926, and the cause was thereupon removed (R. 32). A motion to remand the cause to the county court of Chelan County was thereupon made on the ground that County of Chelan was a necessary, proper and indispensable party to the cause because it held a lien upon this land for the taxes which became due and payable on the 31st day of May, 1927 (R. 33). This motion, made at the request of the Chelan Electric Co., was granted and the cause was remanded November 3, 1926, notwithstanding the fact that the taxes could not be paid by appellant until February, 1927. Appellant was thereby deprived of her right to have this case tried in the Federal Court. Subsequently, on the 27th of June, 1927, at the hearing of the cause to determine the damage to appellant by the taking of her property, after the Chelan Electric Co. had rested its case without proving that any taxes were then due to the County of Chelan, a new petition and bond for removal was filed (R. 275 and 280), and a proposed order of removal was prepared and submitted to the court in

open court. The court took the matter under advisement and the following day signed an order denying a removal to the Federal Court (R. 283).

The Supreme Court of the State of Washington ruled on this point as follows:

> "The relator, Alice Barbee Wick, is and was a resident of Philadelphia, Pennsylvania, and error is assigned on her behalf to the effect that the County of Chelan was improperly made a joint defendant with her, having the effect it is claimed, of depriving her of the right to a removal of her case to the Federal court on account of diverse citizenship. Two answers may be made: first, at the time the action was commenced, general taxes due the County were outstanding and a lien upon the property, and Section 921, Remington's Compiled Statutes, requires the petition in eminent domain cases to set forth the name of each and every owner, encumbrancer or other person or party interested in the property and Section 922, Remington's Compiled Statutes, requires that a notice of such petition be served on each and every person; and second, the record shows that prior to the hearing herein by the trial court, relator Wick did remove the case against her to the Federal court, and upon a hearing thereon that court promptly remanded the cause to the State court, from which order of the Federal court it appears no appeal was prosecuted, nor review sought or had."

The second ground mentioned by the Supreme Court of the State of Washington in this opinion is, of course, baseless for the reason that no appeal or review of the order remanding the cause from the Federal court to the State court would lie. Appellant contends that the interpretation of the State Supreme

Court of this act to the effect that the taxes were a lien upon the property and that therefore the Chelan County was a necessary party to a condemnation proceeding, brings these statutes in conflict with Article III, Sec. 2, paragraph 1 of the Constitution of the United States conferring jurisdiction upon Federal courts over causes where the parties are citizens of different states. The effect of this statute is to deprive any non-resident of the State of Washington of the right to remove a condemnation proceeding to a Federal court.

The validity of the proceeding was also challenged on the ground that it conflicted with the 14th Amendment to the Federal Constitution because there was no adequate description of the property sought to be condemned, that the land appropriated was in excess of the amount authorized by the Federal Power Commission and that the petition did not disclose whether an easement or the title to the property was being condemned.

All of these points were raised by the motions to quash (R. 15) and the demurrer (R. 51), by the proposed conclusions of law and fact (R. 241) and (R. 90) and were passed upon by the Supreme Court of the State of Washington in its opinion in this case (R. 347). These rulings were assigned as error (R. 372).

D. Where the statute of a state as interpreted and applied by the State Court is repugnant to the Constitution a writ of error is proper. Crew Levick Co. vs. Pennsylvania, 245 U. S. 292. Kenney vs. Supreme Lodge, 252 U. S. 411.

Where the law as construed interferes with the rights of persons guaranteed under the Constitution, a writ of error will lie. Mountain Timber Co. vs. Washington, 243 U. S. 219.

The test of constitutionality is to be found in the operation and effect of the law as applied and enforced by the State. St. Louis Southwestern R. R. Co. vs. Arkansas, 235 U. S. 350.

The taking of property for a private use does not constitute due process of law. Hendersonville Light & Power Co. vs. Blue Ridge Interurban Co., 243 U. S. 563.

Where the state's Supreme Court has treated Federal questions as necessarily involved and decided them against the plaintiff, it is immaterial how the questions were raised. Cissna vs. Tennessee, 246 U. S. 289.

Respectfully submitted,

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